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Teachers' Strikes--A New Militancy

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NOTES

TEACHERS' STRIKES — A NEW MILITANCY

"No public employee or employee organization shall engage in a strike, and no employee organization shall cause, instigate, encourage, or condone a strike."
—New York's Taylor Law[1]

"One of the ways in which we test laws . . . and one of the ways in which we change them in a democratic society, is to violate them openly . . . with a willingness to take the consequences in the hope that we can mobilize public opinion and public support to change those laws. . . . The court cannot legally tell anyone to work if they do not want to work. This is not a slave state. It is a democracy."
—Albert Shanker, President,
New York City United Federation of Teachers[2]

"It is no answer to the problem of preventing strikes of government employees to outlaw the 'strike' by legislation. These have proved unworkable and mostly futile. If conditions become utterly intolerable public employees will quit en masse, call it strike or otherwise."
—American Bar Association,
Section of Labor Relations Law[3]

I. Introduction

No one can deny that the teacher occupies a sphere of growing importance in our rapidly-evolving society. Entrusted with the education and intellectual formation of our nation's children, teachers are in a position to fashion thoughts and ideas, goals and directions. ". . . [T]he future of our very lives and of our democratic way of life rests in the hands of those who prepare the adults of tomorrow."[4] Because of their important role in the fabric of our national community, the professional activities of teachers are viewed with keen interest.

Therefore, it is with an uneasy eye that the public has been viewing the growing unrest and militancy in the teaching profession.[5] This bellicose attitude has been recently manifested by teacher strikes, strike threats, or mass resignations in such states as Florida,[6] Illinois,[7] Michigan,[8] New York,[9] Ohio[10] and Rhode Island.[11] As one writer has described this new mood:

> No Madison Avenue campaign has ever changed a client's image as radically as the nation's teachers have changed theirs. Kindly Mr. Chips

1 N.Y. PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT, § 210(1) (McKinney Supp. 1967).
2 N.Y. Times, Sept. 18, 1967, at 52, col. 6 (city ed.).
3 ABA, SECTION OF LABOR RELATIONS LAW, PROCEEDINGS, REPORT OF THE COMMITTEE ON LABOR RELATIONS OF GOVERNMENTAL EMPLOYEES 93 (1955-56).
4 L. GARBER & H. SMITH, THE LAW AND THE TEACHER IN ILLINOIS 116 (1965).
5 In recent years, the staid teaching profession has erupted with demands for considerations of its views. Still making obeisance to their professional status, teacher organizations behave like trade unions as they discuss mutual problems with their employing Board of Education.
Weisenfeld, *Public Employees — First or Second Class Citizens,* 16 LAB. L.J. 685, 694 (1965).
6 N.Y. Times, Sept. 6, 1967, at 48, col. 1 (city ed.).
7 Chicago Sun-Times, Oct. 16, 1967, at 1, col. 1 (final home ed.).
8 N.Y. Times, Sept. 6, 1967, at 48, col. 1 (city ed.).
9 *Id.,* Sept. 11, 1967, at 1, col. 8 (city ed.).
10 *Id.,* Sept. 7, 1967, at 29, col. 8 (city ed.).
11 *Id.,* Sept. 7, 1967, at 29, col. 7 (city ed.).

> and modest schoolmarm have been wiped off the public mind. Tough union leaders and equally tough spokesmen for the once soft-spoken National Education Association and its local affiliates leave no doubt that their mission is not to get a charitable apple for their teachers but to bring home the bacon of new pay scales and power over school policy.[12]

It is in light of these new developments that this Note will re-evaluate the legal status of concerted work stoppages by the teaching profession. This investigation will necessarily include an examination of the organizational efforts of teachers and their success in communicating with school boards through the vehicle of collective bargaining. More importantly, considering the increased aggressiveness of teachers in asserting their demands, the Note will analyze the teacher strike: the factors leading to its use, the legal consequences thereof and the validity of the reasons offered for its illegality. Finally, it will enumerate the traditional alternatives to the strike and propose suggestions for the future.

II. Organizational Efforts

"Public school teachers are exceptionally well organized."[13] The giant in the field is the National Education Association [hereinafter NEA] which, at the end of the first quarter of 1967, held the allegiance of some one million teachers.[14] The NEA is challenged in its quest for teachers' loyalty by the American Federation of Teachers [hereinafter AFT], a rapidly-growing sibling of the AFL-CIO comprised of approximately 125,000 members.[15] While the NEA has great strength in all areas of the country, the AFT and its affiliates have concentrated membership drives in the large metropolitan areas and have won exclusive representation rights in New York City, Philadelphia, Detroit, Cleveland, Chicago, and Boston.[16]

The spreading militancy among teachers is caused in part by the struggle between the NEA and the AFT for new members.[17] Although competition between the two rival organizations has always existed, it rose to a new pitch with the 1961 election of the United Federation of Teachers [hereinafter UFT], an affiliate of the AFT, as sole bargaining representative for the teachers in New

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12 Hechinger, *New Teacher Militancy*, N.Y. Times, Sept. 9, 1967, at 19, col. 3 (city ed.).

13 Glass, *Work Stoppages and Teachers: History and Prospect*, MONTHLY LAB. REV., vol. 90, Aug., 1967, at 43.

14 *Id.* at 43-44.

15 *Id.* For a general discussion of both the NEA and the AFT, see M. MOSKOW, TEACHERS AND UNIONS 93-114 (1966) [hereinafter cited as MOSKOW].

16 ABA, SECTION OF LABOR RELATIONS LAW, REPORTS AND PROGRAM, REPORT OF THE COMMITTEE ON LAW OF GOVERNMENT EMPLOYEE RELATIONS 149 (1966). For a description of the events leading up to the election of the Detroit Federation of Teachers as the exclusive bargaining representative in that city, see ABA, SECTION OF LABOR RELATIONS LAW, REPORTS AND PROCEEDINGS, REPORT OF THE COMMITTEE ON LAW OF GOVERNMENT EMPLOYEE RELATIONS 381-83 (1964). A similar account on the election of the UFT in New York City is found in ABA, SECTION OF LABOR RELATIONS LAW, REPORTS AND PROCEEDINGS, REPORT OF THE COMMITTEE ON LAW OF GOVERNMENT EMPLOYEE RELATIONS 143-49 (1963).

17 Brown, *Teacher Power Techniques*, AM. SCHOOL BD. J., vol. 152, Feb., 1966, at 12, points out that:

> The present teacher militancy, though rooted in economic conditions, is fed and fertilized by competition between the NEA and the AFT. In the search for membership and support, each is attempting to demonstrate to prospective members that it can and does win greater benefits for teachers than the other.

York City.[18] By calling a one-day strike in April, 1962, in which 20,000 teachers refused to work, the UFT was able to obtain a very favorable collective bargaining agreement with the city.[19] The substantial gains made by the UFT and other AFT affiliates through the use of more aggressive methods have placed increasing pressure on the NEA to pursue similar tactics.[20] Consequently,

> Affiliates of the National Education Association, which had not been involved in a single stoppage in the 12-year period, 1952-63, and none in 1965, participated in 11 in 1966 . . . . These 11 stoppages accounted for more than 80 percent of all teachers involved in 1966 stoppages.[21]

The organizational rivalry between the NEA and the AFT offers little hope of subsiding. Emboldened by their recent successes in New York and Detroit, AFT officials will surely intensify their efforts to recruit new members.[22] This, in turn, will place corresponding pressure on the NEA to step up their efforts with the result that the organizational efforts of both groups are likely to increase in the future.

III. Recognition and Collective Bargaining

A. Recognition[23]

In the past, salaries and working conditions for teachers were established unilaterally by the local board of education.[24] Thus, teachers were placed in a position where they had no choice but to accept the decision of the board with regard to these issues. Today, however, boards of education are being forced

18 MOSKOW 98-100; Radke, *Real Significance of Collective Bargaining for Teachers,* 15 LAB. L.J. 795, 800 (1964).

19 MOSKOW 100. For a general examination of the terms of the 1962 agreement that the UFT obtained from the city, see ABA, SECTION OF LABOR RELATIONS LAW, REPORTS AND PROCEEDINGS, REPORT OF THE COMMITTEE ON LAW OF GOVERNMENT EMPLOYEE RELATIONS 146-49 (1963).

20 MOSKOW 182, remarks: "It is often claimed that the AFT is more militant than the NEA, yet when the local affiliates were examined [in study made by the author], many cases were found in which these traditional roles were completely reversed." Another author has noted that ". . . the NEA is running a serious risk of becoming indistinguishable from the Federation." Collins, *Labor Relations under Boards of Education and in Other Municipal Employment,* N.Y.U. 19TH CONF. ON LAB. 189 (1967).

An opposite view was taken in Minneapolis Fed'n of Teachers, Local 59 v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358, 361 (1966), where the court observed:

> These two organizations have deep and irreconcilable differences which give rise to a conflict between them as to the manner in which teachers should communicate and treat with school boards on subjects relating to wages and conditions of employment. (Footnote omitted.)

21 Glass, *supra* note 13, at 44.

22 An underlying reason for the success of the AFT is the financial and advisory aid rendered by the AFL-CIO. In the latter's drive to organize "white collar" and professional workers, successful unionization of the teaching profession would be "an important stepping stone." MOSKOW 99.

23 Since this area will not be treated in depth, a general discussion of exclusive recognition in the public education field can be found in M. LIEBERMAN & M. MOSKOW, COLLECTIVE NEGOTIATIONS FOR TEACHERS 91-120 (1966) [hereinafter cited as LIEBERMAN & MOSKOW] and at MOSKOW 127-36. *See also* Seitz, *Rights of School Teachers to Engage in Labor Organizational Activities,* 44 MARQ. L. REV. 36 (1960).

24 MOSKOW 1. The terms "school board" and "board of education" are used synonymously to denote the local statutory political unit that is delegated control over education.

to at least listen to and consider the requests of teacher organizations. "The days when a delegation from the local teachers' organizations waited upon the superintendent and school board and politely presented their request are over. The days when the school board can arbitrarily deny those requests are also over."[25]

Yet the fact that school boards are finally giving attention to teacher demands is of little significance unless there is some official form of exclusive recognition. In localities where the board recognizes and deals with two or more teacher organizations, the position of the teacher is weakened considerably.[26] Needless to say, where one organization is the exclusive representative of all the teachers in a district, the converse is true. However, current school board practice regarding recognition differs greatly. Although some states provide for exclusive recognition by statute,[27]

> . . . as of 1966 most states have no statutory or judicial requirements, authorizations, or prohibitions concerning recognition. As a result, most school districts are legally free to take whatever action they wish concerning recognition. This legal freedom is conditioned by local attitudes toward recognition, and the result is a variety of practices encompassing all the types of recognition in education.[28]

The fact that exclusive recognition is an obvious benefit to teacher organizations, coupled with the wide divergence of policy of most states on the topic, lends credence to the conclusion that " . . . recognition has been, is, and will continue to be a major problem for many years to come."[29]

B. Collective Bargaining

1. Arguments Pro and Con

One of the ways in which teacher organizations impart their demands to school boards is through the medium of collective bargaining.[30] Many attempts to establish a general rapport between these two camps have ended in failure.

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25 Boutwell, *What's Happening in Education?* THE PTA MAGAZINE, vol. 61, Jan., 1967, at 17.

26 Before the 1961 election in New York City, *supra* note 18 and accompanying text, the Board of Education accorded equal representation rights to some ninety-three different teacher organizations. LIEBERMAN & MOSKOW 92.

27 *See, e.g.*, MASS. ANN. LAWS, ch. 149, § 178H (Supp. 1966); MICH. STAT. ANN. § 17.455(11) (Supp. 1965); R.I. GEN. LAWS ANN. § 28-9.3-3 (Supp. 1966).

28 LIEBERMAN & MOSKOW 101-02. "Unless there is enabling statutory legislation (and generally throughout the country there is not such legislation) there are no established procedures by which unions or organizations of teachers . . . can compel School Boards to recognize them and bargain collectively." Seitz, *Rights of School Teachers to Engage in Labor Organizational Activities, supra* note 23, at 36.

However, the NEA Research Division reports: "In 1966-67, more than 41 percent of the instructional staff of the United States were recognized by their school boards for purposes of negotiation." NEA J., vol. 56, Sept., 1967, at 34.

29 LIEBERMANN & MOSKOW 100.

30 There has been a problem of semantics in this area. Because the NEA considers itself more of a professional organization, it prefers the term "professional negotiations." The AFT, on the other hand, uses the familiar union phrase "collective bargaining." For purposes of consistency, this writer will use the term "collective bargaining" to designate situations in which the representative teacher organization, be it the NEA or the AFT, meets with the local school board to discuss salaries and working conditions. LIEBERMAN & MOSKOW, at 1-6, discusses this issue and uses the designation "collective negotiations" as a compromise.

> A review of the attempts of public school teachers to obtain some satisfactory basis for meaningful communication with school boards by which their demands might be made known, considered, and resolved in a manner consistent with individual dignity and the ethics of their calling is a study of frustration.[31]

General power over education rests in the state governments.[32] Although this power is set forth in the constitution of each state,[33] ". . . most provisions are very general, and the legislature is usually given responsibility for the establishment, maintenance, or support of the schools. Generally, state constitutions place few restrictions on the power of the legislature to control education."[34] Because education is a function of the state, local boards of education are regarded only as agents exercising the delegated power of the state.[35] Those who would refuse to allow boards of education to bargain collectively argue that to authorize such a practice would be to delegate the power of the sovereign to a group of individuals.[36] Opponents of collective bargaining for teachers maintain that if the school board is forced to concede to proposals in a bargaining session, it would constitute an illegal delegation of the sovereign's power since the teachers, not the board, would be establishing salaries and working conditions. For this reason, the "delegation-of-authority" argument is frequently used to deny teachers the right to bargain collectively with school boards.

This argument appears both unrealistic and untenable for several reasons. First, "[t]here is no overwhelming evidence to indicate that the use of bargaining power by public school teachers is detrimental to the public interest."[37] Quite the contrary, school boards could benefit from collective bargaining with teacher groups.

> One of the most valuable resources of the school board is the teaching staff. They are experienced and knowledgeable in the day to day opera-

31 Minneapolis Fed'n of Teachers, Local 59 v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358, 361 (1966).

32 L. GARBER & H. SMITH, *supra* note 4, at 6, where the authors observe:

> . . . it is generally agreed that education is a function of the state — that in the state is to be found the authority to create, maintain, and support a system of public schools. This follows from the fact that, in our form of government, the state is sovereign. Its authority, expressed in its constitution and statutes, is unlimited except with respect to those powers it . . . specifically granted to the federal government by the United States Constitution. Education not being one of these powers, it is retained by the states. With this, the courts of both the states and the federal government are in total agreement.

33 *See, e.g.*, ALA. CONST. art. 14, §§ 256-70; ILL. CONST. art. 8, §§ 1-5; OHIO CONST. art. 6, §§ 1-4; WIS. CONST. art. 10, §§ 1-8.

34 MOSKOW 19.

35 Rezny, *School Board Procedure and Non-Delegable Power*, LEGAL PROBLEMS OF SCHOOL BOARDS 17 (A. Rezny ed. 1966) points out: "The school board is an administrative unit of government. It is an agent of the state and is given mandatory, directory, or permissive powers to carry out the educational program established by the state."

36 Dean Seitz summarized this argument:

> 1. The fixing of conditions of work in the public service is a legislative function.
> 2. Neither the executive nor the legislative body may delegate such functions to an outside group.
> 3. The legislature or executive must be free to change the conditions of employment at any time. (Footnote omitted.) Seitz, *Legal Aspects of Public School Teacher Negotiating and Participating in Concerted Activities*, 49 MARQ. L. REV. 487, 488 (1966).

This is the position taken by the National School Boards Association. Radke, *supra* note 18, at 795.

37 MOSKOW 210.

> tions of the school system. As professional personnel, they are theoretically concerned more with the public interest than their own private interests. In addition, they have been professionally trained and probably have some ideas on how the school system could be improved. Obviously, not all of their ideas will be acceptable, but it nevertheless would be foolish not to take advantage of their expertise. It is possible that collective bargaining may be the mechanism which could be used by the school board to receive the benefits of the teachers' experience. Thus, collective bargaining may actually increase the effectiveness of the schools, and therefore benefit the public interest.[38]

Secondly, besides providing the school board with constructive ideas from individuals versed in the everyday needs of the system, collective bargaining would cultivate healthful relations between the board and the teaching staff.[39] Not only would good faith collective bargaining be sound personnel administration with regard to the teachers, it would also create ". . . a climate which will enlighten the general public as to problems of the school and enlist assistance for their solution."[40]

Finally, it can be argued that school boards do not delegate any sovereign power when bargaining with teacher representatives. Collective bargaining does not *require* the board of education to capitulate to teacher demands.[41] It merely means that the local board is using a *different medium*, collective bargaining, in the exercise of its delegated powers.[42] The final decision in all cases will rest with the school board itself and the fact that it has given consideration to proposals from outside sources should not render such decisions invalid delegations of sovereign power. "It is submitted that boards of education might very well stop trying to label provisions for collective bargaining illegal and turn their attention toward working out procedures which will make . . . bargaining something which is practical and expeditious."[43]

2. Statutory Enactments

Many state statutes on this topic are permissive in nature. That is, they allow the governmental unit to bargain collectively, but they do not require it to do so.[44] However, there is a definite trend today to compel school boards to meet with teacher representatives and negotiate such items as wages and working

38 *Id.* at 181-82.

39 Seitz, *Rights of School Teachers to Engage in Labor Organizational Activities, supra* note 23, at 43. This rationale is evident in the policy statements of the several states which have mandatory collective bargaining on the part of school boards. *See, e.g.,* R.I. GEN. LAWS ANN. § 28-9.3-1 (Supp. 1966), where the legislature proclaimed that it ". . . recognizes teaching as a profession which requires special educational qualifications and that to achieve high quality education it is *indispensable* that good relations exist between teaching personnel and school committees." (Emphasis added.)

40 Seitz, *Rights of School Teachers to Engage in Labor Organizational Activities, supra* note 23, at 43.

41 *Id.*

42 Note, *Union Activity in Public Employment,* 55 COLUM. L. REV. 343, 351 (1955).

43 Seitz, *Legal Aspects of Public School Teacher Negotiating and Participating in Concerted Activities, supra* note 36, at 509.

44 *E.g.,* ALASKA STAT., § 23.40.010 (1962) provides:

> (a) The state or a political subdivision of the state, including but not limited to an organized borough, municipal corporation, independent school district, incorporated school district, and public utility district, may enter into a contract with a

conditions. Within recent years, at least nine states have enacted provisions that make collective bargaining on the part of the school board mandatory rather than merely permissive.[45]

Typical of such legislation is the Rhode Island School Teachers' Arbitration Act,[46] approved in 1966. It grants teachers the right to organize and bargain collectively,[47] provides for exclusive recognition,[48] and requires the school board to bargain in good faith.[49] Election of a bargaining agent is supervised by the state labor relations board upon submission of a written petition signed by at least twenty percent of the teachers in the particular district.[50] When negotiations involve salaries or other matters requiring an appropriation of money, the teacher representative must notify the board at least four months prior to the final date on which the money can be appropriated.[51] Issues that are unresolved by such negotiations are submitted to mediation and, when an impasse still occurs, to binding arbitration.[52] Although the Rhode Island act is a laudable piece of legislation, it illustrates one of the basic weaknesses of collective bargaining for teachers by providing that the decision of the arbitrators is binding on all matters except those "involving the expenditure of money."[53] Such weaknesses could prove to be fatal to the operation of such compulsory arbitration programs.

3. Difficulties Inherent in Collective Bargaining for Teachers

The very fact that education is a state function raises doubts as to the real viability of collective bargaining between school boards and teachers. One of the essential factors for successful collective negotiations in the private sector is that management has the ability to make binding commitments with labor. This is not always possible in the public area.[54] While the basic source of revenue for the local school district is the property tax, a substantial percentage is derived

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labor organization whose members furnish services to the state or the political subdivision.

(b) Nothing contained in this chapter requires the state or political subdivision of the state to enter into a union contract.

45 CAL. EDUC. CODE § 13085 (West Supp. 1966); CONN. GEN. STAT. ANN. § 10-153d (1967); MASS. ANN. LAWS, ch. 149, § 178I (Supp. 1966); MICH. STAT. ANN. § 17.455(15) (Supp. 1965); N.Y. PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT § 204(2) (McKinney Supp. 1967); ORE. REV. STAT. § 342.460(1) (1965); R.I. GEN. LAWS ANN. § 28-9.3-4 (Supp. 1966); WASH. REV. CODE ANN. § 28.72.030 (Supp. 1966); WIS. STAT. ANN. § 111.84(1)(d) (Supp. 1967). The New York statute declares: "Where an employee organization has been certified or recognized . . . , the appropriate public employer *shall be* . . . required to negotiate collectively with such employee organization . . . ." (Emphasis added.)

46 R.I. GEN. LAWS ANN. §§ 28-9.3-1 to 28-9.3-16 (Supp. 1966).

47 *Id.* § 28-9.3-2.

48 *Id.* § 28-9.3-3.

49 *Id.* § 28-9.3-4.

50 *Id.* §§ 28-9.3-5, 28-9.3-6.

51 *Id.* § 28-9.3-8.

52 *Id.* §§ 28-9.3-9 to 28-9.3-12.

53 *Id.* § 28-9.3-12.

54 Wollett, *The Public Employee at the Bargaining Table: Promise or Illusion?* 15 LAB. L.J. 8, 9 (1964). This limitation was recognized in one of the most widely quoted cases on the issue of teachers' right. In Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 277, 83 A.2d 482, 486 (1951), the Supreme Court of Connecticut stated that the right of teachers to organize and bargain collectively ". . . means nothing more than that the plaintiff may organize and bargain collectively for the pay and working conditions *which it may be in the power of the board of education to grant.*" (Emphasis added.)

from the state.[55] Therefore, since the local school district is dependent upon state allocations to supplement its own resources, it is difficult, if not impossible, for the school board to bargain meaningfully with teacher organizations over matters that require an increase in spending.[56] Other subjects that may be beyond the pale of teacher-school board negotiations because they are controlled by state law include certification,[57] retirement[58] and tenure.[59] Consequently, depending upon the amount of control exercised by the particular state, the scope of the bargaining power possessed by the board of education may be narrowed considerably.[60]

Collective bargaining between teachers and school boards today, therefore, occupies a vast "middle ground." School boards can bargain, but not on all subjects; they can make commitments, but they may not be binding. It seems likely that collective bargaining under this "middle ground" approach will evolve into one of two possible forms: a hollow process through which only minor, nonessential issues are resolved or a highly complex arrangement including state as well as local officials.

4. Suggestions for the Future

Two possible alternatives might be available to avoid the complications that arise under the "middle ground" approach. Both possibilities involve the degree of control exercised by the board. One solution might be to delegate more authority to the local board of education.[61] By increasing the possible sources of revenue available to the board and its control over such sources, the problem of bargaining over matters that call for an increase in spending would be lessened.[62] However, inability to bargain over topics regulated by state law would remain.

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55 In 1961-62, 56.9 percent of public school revenues came from local tax sources, 38.7 percent was received as grants . . . from state governments, and 4.3 percent was received in grants from the federal government.

> Approximately 53 percent of all expenditures for public education are financed by the general property tax . . . .

MOSKOW 13.

56 Wollett, *supra* note 54, at 10, writes ". . . if an increase in teachers' salaries depends upon expansion of the revenues available for the school district, the procedures of collective bargaining are useless."

Hence, the reason for the Rhode Island provision, R. I. GEN. LAWS ANN. § 28-9.3-8 (Supp. 1966), noted earlier in note 51. By requiring teacher bargaining agents to tender a one hundred and twenty day advance notification whenever negotiations will involve an expenditure of money, the statute gives the parties a chance to reach agreement before the deadline on submission of budget appropriations to the state.

57 *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 15-231 to 15-234 (1956); MO. ANN. STAT. §§ 168.011-168.091 (1965); ORE. REV. STAT. §§ 342.120-342.190 (1965).

58 *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 15-1401 to 15-1471 (1956); CAL. EDUC. CODE §§ 13801-14415 (West 1960); GA. CODE ANN. §§ 32-2901 to 32-2929 (1952).

59 *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 15-251 to 15-261 (Supp. 1967); N.J. STAT. ANN. §§ 18:13-16 to 18:13-20 (Cum. Supp. 1964); ORE. REV. STAT. §§ 342.805-342.955 (1965).

60 *See* MOSKOW 19, where the author writes:

> Because of the considerable degree of state control of public education, certain subjects . . . will be precluded from local level collective bargaining in most cases. . . . [G]reat variety exists among the states in the degree of state control of working conditions of teachers. Thus, the appropriateness of local level collective bargaining on any given topic will depend on the conditions in that particular state.

61 One commentator refers to the establishment of fiscally independent school boards, advocated by both the NEA and the AFT, as "suicidal." Lieberman, *Teachers' Strikes: Acceptable Strategy?* 46 PHI DELTA KAPPAN 237, 240 (1965).

62 *See generally* MOSKOW 31, where the author admits that any attempt to increase

A second solution might be to shift financing of public education from the local to the state level. Instead of relying on the property tax to supply revenue for education, the state could appropriate a graduated percentage of each individual's income.[63] Such an assessment could be levied in conjunction with the state income tax prevailing in many states or through an independent system. Allocation of funds could be made to each school district on the basis of a budget submitted by the local board of education. This would raise the quality of education throughout the state by making more funds available to poorer school districts.

The advantage of such an arrangement is that it would enable teacher organizations and school boards to bargain more effectively. Demands for an increase in revenue could be made at the state level through the process of budgetary hearings. This is also true with regard to the various state-controlled matters, such as retirement and tenure. At the local level, school boards would be able to make more definite proposals on salary increases. Whatever may be the final development in this area, the answers to the present problems "... lie, not in the past, but in the future — in ideas as yet undiscovered and in experiments not yet undertaken, demanding fresh perspectives and new approaches."[64]

IV. Teacher Strikes

A. Causes of Teacher Militancy

As pointed out earlier, there is a growing feeling of militancy on the part of teachers throughout the nation. Along with the recent upsurge of strikes by public employees in general,[65] those on the part of teachers have also increased.[66] During the period 1956-1966, there were only thirty-five recorded teacher strikes.[67] However, "[t]he year of 1966 marked a sudden upswing. . . . Thirty-three stoppages were recorded during the year, followed by an additional 11 in the first quarter of 1967."[68]

One of the reasons for this new spirit of aggressiveness, the rivalry between the NEA and the AFT, has already been discussed.[69] Although teacher militancy may be "... fed and fertilized by competition between the NEA and the AFT,"[70] the primary reason for the current unrest is money. Teachers simply want higher salaries for the work they are performing.

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revenues for education presents a "unique problem" and goes on to state:

> In order to achieve maximum success, any attempt would have to be a two-pronged effort. First, efforts would have to be directed at increasing the aspirations and goals of the school board, and second, efforts would have to be directed at changing the attitudes of the citizens in the community.

63 Under the property tax method of raising educational revenue, *all* property owners are taxed—regardless of whether or not they have children using the schools. The rationale is that all taxpayers must pay for a public service even though they may not take advantage of it. The same rationale is carried through under this plan.

64 Wollett, *supra* note 54, at 15.

65 Glass, *Work Stoppages and Teachers: History and Prospect*, MONTHLY LAB. REV., vol. 90, Aug., 1967, at 43.

66 *Id.*

67 *Id.*

68 *Id.*

69 See notes 17-22 *supra* and accompanying text.

70 Brown, *Teacher Power Techniques*, AM. SCHOOL BD. J., vol. 152, Feb., 1966, at 12.

> Dissatisfaction with salaries is still the most concrete grievance. Pay for urban teachers has more than tripled since 1939, but these gains lag behind those of industrial workers. And they cannot stand comparison with the top brackets of other professions, such as law, medicine and engineering.
>
> Average teachers' salaries now amount to $7,000, but only slightly more than 6 percent of the nation's two million teachers are in the $10,000 and above category, and the "above" rarely exceeds $13,000.[71]

Although minimum teachers' salaries are usually established by the legislature,[72] the exact amount is left up to the local school board with the result that salaries may vary considerably throughout the state.[73] School boards and administrators themselves often recognize the legitimacy of teacher demands for higher salaries, but confess that they do not have the financial resources to satisfy such requests.[74]

Closely related to the problem of salary increases is the wage structure itself, which is based on seniority. Teachers consider their vocation a "profession." Yet it is subject to so many regulations that it approaches the status of a civil service job. One writer perceptively views the problem as ". . . how to satisfy professional salary demands within a civil service wage structure with automatic step-up for great numbers and with little or no differentiation between mediocre and successful accomplishments."[75]

A more general reason for the upswing in teacher strikes is the increased use of militancy by minority groups throughout the nation. This is most notable in the civil rights and anti-Vietnam protestations. These massed displays of power have not gone unnoticed by teachers who ". . . see other power blocs getting their share not through reasonableness but by belligerence. Even in their own field, they have seen administrators' cliques neutralize Board of Education policies. They see parents' and community groups conquering new fields of power."[76] Finally, an added element in large metropolitan areas is the problem

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71 Hechinger, *New Teacher Militancy*, N.Y. Times, Sept. 9, 1967, at 19, col. 3 (city ed.).

72 *See, e.g.*, ARK. STAT. ANN. § 80-1327(a)(1) (Supp. 1967) ($3,600); CAL. EDUC. CODE § 13525 (West Supp. 1966) ($5,000); W. VA. CODE ANN. § 18-7-2 (1966) ($4,000). The quoted figures are the minimum starting salary for a teacher with a bachelor's degree.

73 N.Y. Times, Sept. 6, 1967, at 48, col. 2 (city ed.), reporting on the recent teacher work stoppages in Florida, noted: "Teacher salaries, which are paid in Florida by a combination of state and county taxes, vary widely throughout the state, according to the amount of local support."

74 During the recent strike in Detroit, the superintendent of schools for that city stated: "Our teachers would be justified in receiving more than we offer them . . . . But we simply do not have the funds." N.Y. Times, Sept. 9, 1967, at 19, col. 5 (city ed.).

Similarly, on the eve of the strike in New York City, the President of the Board of Education declared:

> For many months the Superintendent of Schools . . . has negotiated with the teachers' representatives. We were restricted by lack of funds. One cannot bargain with an empty pocketbook. We publicly declared to the Mayor and the public that we were unable to make an adequate offer to meet the *legitimate requirements* of our teachers and appealed urgently for funds. We knew our teachers were entitled to more than our budget could permit. (Emphasis added.)

N.Y. Times, Sept. 9, 1967, at 18, col. 3 (city ed.).

75 Hechinger, *supra* note 71.

76 *Id.* at col. 4.

of the ghetto school with its overtones of racial strife, poor working conditions, and educationally deprived children.[77]

B. Teacher Pressure Tactics

Of the various pressures that are available to public school teachers, the most controversial, by far, is the strike.[78] In spite of the recent furor over strikes by teachers, there are still many within the profession who do not favor such conduct. A recent probability sample of both members and nonmembers taken by the Research Division of the NEA disclosed:

> More than one-third of all public school teachers believe categorically that teachers should *never* strike. On the other hand, one-half of all teachers believe teachers should strike, but only under *extreme* conditions and after all other means have failed.[79]

Likewise, ". . . public employee organization officials agree that the strike is a last resort . . . ."[80] Analyzed with respect to this criterion, the increase in teacher strikes indicates that more and more teachers feel placed in a "last resort" position.

When employed, ". . . a teacher strike in which the teachers are united, well organized, adequately financed, and ably led can exert tremendous bargaining power on a school board or other governmental body."[81] However, these conditions are not easily achieved.

> In order for the teachers to be united, their cause must be clear and convincing to the overwhelming majority of them. Even if it is clear and convincing, the teachers must be ready to assume the risks inherent in a strike. Unless extensive preparations are made, teachers will ordinarily not be willing to assume the risks, however justified they believe their objectives to be.[82]

On account of these difficulties, the threat of a strike may often be more effective than the strike itself.[83]

Apart from their legality, which will be discussed later, teacher strikes have been criticized as having the effect of alienating the public.[84] While teacher

77 Indeed, one of the major issues in the New York strike was the UFT's demand for additional expenditures to increase the More Effective Schools program designed to aid culturally deprived slum children. N.Y. Times, Sept. 10, 1967, at 79, col. 1-2.

78 Strikes by public employees have been the subject of several recent commentaries. *See, e.g.,* Foegen, *A Qualified Right to Strike—in the Public Interest,* 18 LAB. L.J. 90 (1967); Sullivan, *How Can the Problem of the Public Employees Strike be Resolved?* 19 OKLA. L. REV. 365 (1966); Comment, *Right of Public Employees to Strike,* 16 DEPAUL L. REV. 151 (1966); Note, *The Strike and Its Alternatives in Public Employment,* 1966 WIS. L. REV. 549.

79 NEA J., vol. 55, May, 1966, at 54.

80 BUSINESS WEEK, Dec. 3, 1966, at 96.

81 LIEBERMAN & MOSKOW 302.

82 *Id.*

83 Wollett, *supra* note 54, at 12.

84 *Id.* at 13; Brown, *supra* note 70, at 12-13.

organizations feel that strikes serve a useful purpose by eliciting public support for their cause,[85] one commentator has stated that:

> . . . it remains doubtful that either strikes or strike threats, even with all their accompanying sound and fury, are genuinely effective. Occasionally they may be, but in the main it seems more probable than not that they will be self-defeating, serving primarily to alienate the public whose support is needed in order to finance improvements . . . .[86]

Even though this objection may have merit, strikes still occur and often terminate with very favorable contracts for the striking teachers.[87]

A second coercive technique utilized by teacher organizations is that of "mass resignations." Using this method, teachers fill out uniform resignation forms supplied by the local teacher organization.[88] These are then held by the individual teacher or returned to the organization. The purpose is the same under both approaches — to threaten the school board with the loss of a sizable portion of its instructional staff unless teacher demands are met. Recent examples of this approach include Florida[89] and New York City where the superintendent of schools admitted that " . . . the board would not be able to replace the instructors in the event of a mass resignation."[90] The difficulty inherent in the use of this technique is that unless the resignations are truly "individual," in the sense that each teacher submits his own resignation to the board of education, teachers run the risk of being enjoined by the courts for participating in a concerted work stoppage or strike.[91]

85 During the New York City teachers' strike, the president of the UFT was quoted as saying that the union's purpose in defying the anti-strike law was to "mobilize public opinion and public support." N.Y. Times, Sept. 18, 1967, at 52, col. 6 (city ed.).

86 Wollett, *supra* note 54, at 13.

87 The strike in Detroit ended with the largest contract in the history of the local affiliate of the AFT. The school year was reduced; teacher participation in textbook selection and curriculum arrangement increased; and starting salaries for the holder of a B. A. degree raised from $5,800 to $6,650 the first year the contract is in effect, and to $7,500 the second year. Little wonder that the vice-president of the union remarked that there " 'was nothing else to be wrung' from the school board." N.Y. Times, Sept. 19, 1967, at 36, col. 7 (city ed.).

88 The teachers in Pawtuckett, Rhode Island, staged a walkout similar to a mass resignation in 1965. Although individual teachers did not submit resignation forms, they did refuse to work after members of their negotiating committee and the president of the state federation each read the following statement before a mass meeting of the city's teachers:

> On the basis of the highest law of the land, the Constitution of the United States, and specifically the Thirteenth Amendment which prohibits forced and involuntary servitude, and on the basis of the decision of the Supreme Court of the State of Rhode Island which cites Manchester v. Manchester Teachers' Guild, 1-100 New Hampshire, 507, 512, (131 A.2d 59) "the preliminary injunction restrained the concerted action of the respondents but did not in any way impose on any individual the obligation to work against his will."
>
> On this legal basis and owing to the conditions existing in the Pawtuckett School System. I, . . . [name of individual], as an individual, will not work in the Pawtuckett School System until true collective bargaining prevails between my Teachers Alliance and the School Committee of the City of Pawtuckett.

School Comm. v. Pawtuckett Teachers Alliance, Local 930, 221 A.2d 806, 810 n.1 (R.I. 1966).

89 N.Y. Times, Sept. 6, 1967, at 48, col. 1 (city ed.).

90 N.Y. Times, Sept. 3, 1967, at 26, col. 8.

91 Opinion of the court in Board of Educ. v. Shanker, dated Sept. 13, 1967, granting a preliminary injunction and denying defendant's cross-motion, as found in N.Y.L.J., Sept. 15, 1967.

A third pressure tactic available to teachers is the use of "sanctions." Sanctions are the creation of the NEA and, as employed by that organization,

> . . . mean censure, suspension or expulsion of a member; severance of relationship with an affiliated association or other agency; imposing of a deterrent against a board of education or other agency controlling the welfare of the schools; bringing into play forces that will enable the community to help the board or agency to realize its responsibility; or the application of one or more steps in the withholding of services.[92]

There are different forms of sanctions,[93] but in their " . . . most severe form . . . sanctions mean that NEA members in the jurisdiction refrain from negotiating new contracts and NEA members elsewhere are advised of the situation."[94] Despite the contention made by some that sanctions are synonymous with strikes,[95] "[t]he truth is there is a vast difference. Sanctions do not propose to violate a contract, do not interrupt services to children, do not use the picket line to assure the closing of schools."[96]

When used adroitly by a teacher organization, sanctions could prove to be a far more devastating weapon than the strike. Unlike the strike which is always illegal,[97] properly invoked sanctions could probably not be enjoined by the courts. Dean Seitz has commented:

> It is hard to find any illegality in the sanction which is sparked only by an appeal to teachers not to sign contracts or take jobs in an area. This sort of an appeal is surely free speech and the individual certainly has a constitutional right to determine if he will work. Illegality would appear only if the organization induced some kind of boycott pressure which resulted in teachers who did not heed the call to sanction losing job opportunities.[98]

The deleterious effect of full and successful sanctions upon a school system or state would be far greater than that of a strike. An iron-clad state-wide sanction could virtually bring the entire educational system to its knees and impair its efficiency far into the future.

> If a school board or state meets the demands of the teachers shortly after sanctions are imposed, the harm they do will be negligible. If the sanctions continue for an extended period of time, and the organization is successful in cutting off the supply of new teachers and persuading those in the system to relocate, the school administration will probably not be

92 NEA, *Guidelines for Professional Sanctions* 9 (1963), cited in MOSKOW 199.

93 MOSKOW 199-200, again quoting from the NEA's *Guidelines for Professional Sanctions,* cites various types of sanctions in addition to that of refusal to enter into a new contract.

94 Klein, *The NEA Convention and the Organizing of Teachers,* 87 MONTHLY LAB. REV. 882, 884 (1964).

95 Weisenfeld, *Public Employees—First or Second Class Citizens,* 16 LAB. L.J. 685, 694 (1965), where the author declares: "The word 'sanctions' is merely educationalese for the word 'strike.' "

96 Stinnett, *Professional Negotiation, Collective Bargaining, Sanctions, and Strikes,* BULLETIN OF THE NATIONAL ASSOCIATION OF SECONDARY-SCHOOL PRINCIPALS, vol. 48, April, 1964, at 101.

97 See text accompanying notes 104-10 *infra.*

98 Seitz, *Legal Aspects of Public School Teacher Negotiating and Participating in Concerted Activities,* 49 MARQ. L. REV. 487, 506 (1966).

> able to hire a fully qualified staff even if and when it meets the demands of the teachers. Unless the original teaching staff was of poorer quality than the new staff . . . , considerable harm may be done by this form of sanctions. Even with good working conditions, it usually takes years to build up a high-quality teaching staff. If any substantial number of teachers are persuaded to leave or to avoid employment in the system, it will be virtually impossible for the system to be as effective as it was before the imposition of the sanctions.[99]

It is submitted that those who are concerned with the expanding use of the strike by teacher organizations would be well advised to examine the far greater possibility of harm engendered by legitimately imposed sanctions.

Finally, there are a host of less important methods which teachers can employ to call attention to their demands and stimulate the school board into action. They can refuse to participate in extracurricular activities,[100] picket the school in their off-hours,[101] protest openly at public school board meetings[102] and actively campaign in board of education elections.[103] Naturally, the application of any given method will depend upon the goal to be attained and the amount of pressure necessary to achieve it. The techniques set forth here serve merely as illustrations and are limited only by the imagination of the individuals who manipulate them.

C. Legal Status of Teachers' Strikes

There is no difference of opinion over the legal right of teachers to strike. They are classified as governmental employees and " . . . every judicial decision on the subject holds that there is no right to strike against the government."[104] This principle was recently reaffirmed in *Board of Education v. Shanker*, where the court issued a permanent injunction against the striking UFT in New York City and forcefully declared:

> From time immemorial, it has been a fundamental principle that a government employee may not strike. In this sensitive area, neither labor — the public employee — nor management — the governmental agency — in their mutual interdependence can afford the indulgence of arbitrary self-interest at the expense of the public.[105]

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99 LIEBERMAN & MOSKOW 308. Sanctions were imposed upon Florida during the summer of 1967 by the NEA and 2,385 teachers resigned in one county alone. N.Y. Times, Sept. 7, 1967, at 25, col. 2 (city ed.).

100 MOSKOW 205.

101 *Id.* at 205-06.

102 *Id.* at 206.

103 *Id.*

104 Potts v. Hay, 229 Ark. 830, 318 S.W.2d 826, 827 (1958) (dictum). For an excellent compilation of decisions denying governmental employees the right to strike, see Annot., 31 A.L.R.2d 1142 (1953).

105 Board of Educ. v. Shanker (Sup. Ct., N.Y. County, Oct. 4, 1967). Strikes by teachers have also been struck down in Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951) (declaratory judgment); South Bend Community School Corp. v. South Bend Fed'n of Teachers, No. D-3208 (Super. Ct., St. Joseph County, Ind., filed Oct. 2, 1967); City of Manchester v. Manchester Teachers Guild, 100 N.H. 507, 131 A.2d 59 (1957); School Comm. v. Pawtuckett Teachers Alliance, Local 930, 221 A.2d 806 (R.I. 1966); City of Pawtuckett v. Pawtuckett Teachers Alliance, Local 930, 87 R.I. 364, 141 A.2d 624 (1958).

Apart from judicial decision, strikes by government employees are prohibited by statute on the federal level[106] and by the legislatures of at least sixteen states.[107]

Various reasons are offered in denying governmental employees the right to strike. Some courts have declared that " . . . the underlying basis is the doctrine that governmental functions may not be obstructed or impeded."[108] Others have stated that a strike by public employees violates the authority of the government.[109] Lastly, prohibition of such strikes has been premised on the proposition that public health and safety must be protected.[110] An extra-legal element mentioned by courts that have enjoined teacher strikes is that such activity creates an unfavorable impression on the children involved.[111] In *South Bend Community School Corporation v. South Bend Federation of Teachers*, the court remarked:

> It is difficult to conceive how teachers can demand and command respect for the authority of their class room rules and at the same time appear before their students outside the building in open defiance of their duties under both public law and private contract.[112]

While this last argument may possess merit, there is no empirical data to support it. One commentator has remarked that " . . . even in jurisdictions where a strike is illegal, there is no convincing evidence that teacher strikes have had any lasting impact on students because of the illegality factor."[113]

D. Ineffectiveness of Anti-Strike Laws

Anti-strike legislation and judicial precedents have presented no real obstacle

106 5 U.S.C. § 7311 (Supp. II, 1964).

107 CONN. GEN. STAT. ANN. § 10-153e (1967) (school teachers specifically); FLA. STAT. ANN. § 839.221 (1965); GA. CODE ANN. § 89-1301 (1963); HAWAII REV. LAWS, § 5-8 (1955); MASS. ANN. LAWS, ch. 149, § 178M (Supp. 1966); MICH. STAT. ANN. § 17.455(2) (1960); MINN. STAT. ANN. § 179.51 (1966); NEB. REV. STAT. § 48-821 (1960); N.Y. PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT, § 210(1) (McKinney Supp. 1967); OHIO REV. CODE ANN. § 4117.02 (Page 1965); ORE. REV. STAT. § 243.760 (1965); PA. STAT. ANN., tit. 43, § 215.2 (1964); R.I. GEN. LAWS ANN. § 28-9.3-1 (Supp. 1966) (school teachers specifically); TEX. REV. CIV. STAT., art. 5154c(3) (1962); VA. CODE ANN. § 40-65 (1953); WIS. STAT. ANN. § 111.70(4)(*l*) (Supp. 1967).

108 City of Pawtuckett v. Pawtuckett Teachers Alliance, Local 930, 87 R.I. 364, 141 A.2d 624, 628 (1958). *Accord*, Board of Educ. of Community Unit Sch. Dist. No. 2 v. Redding, 32 Ill.2d 567, 571-72, 207 N.E.2d 427, 430 (1965); City of Manchester v. Manchester Teachers Guild, 100 N.H. 507, 510, 131 A.2d 59, 61 (1957).

109 Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 276, 83 A.2d. 482, 485 (1951); Board of Educ. v. Shanker (Sup. Ct., N.Y. County, Oct. 4, 1967).

110 Donevero v. Jersey City Incinerator Auth'y, 75 N.J. Super. 217, 222, 182 A.2d. 596, 599 (1962), *rev'd on other grounds sub nom.* McAleer v. Jersey City Incinerator Auth'y, 79 N.J. Super. 142, 190 A.2d. 891 (1963); Port of Seattle v. International Longshore. & W.U., 52 Wash. 2d 317, 324 P.2d. 1099, 1102 (1958).

111 South Bend Community School Corp. v. South Bend Fed'n of Teachers, No. D-3208 (Super. Ct., St. Joseph County, Ind., filed Oct. 2, 1967); Board of Educ. v. Shanker (Sup. Ct., N.Y. County, Oct. 4, 1967). Seitz, *Legal Aspects of Public School Teacher Negotiating and Participating in Concerted Activities, supra* note 98, at 504, where the author writes that "teachers cannot forget that they work in a delicate area where it is of the utmost importance that young people be encouraged to respect the legimate authority of school personnel."

112 No. D-3208 (Super. Ct., St. Joseph County, Ind., filed Oct. 2, 1967).

113 Lieberman, *Teachers' Strikes: Acceptable Strategy?* 46 PHI DELTA KAPPAN 237, 238 (1965).

to teachers and have generally proven ineffective. Concrete examples of this fact have already been mentioned. Despite the presence of specific legislation prohibiting strikes by public employees in both Michigan and New York, teachers refused to work in Detroit and New York City and received substantial contract increases in each instance. There are several reasons why the legal remedies in this area have proven inadequate.

First, anti-strike legislation that imposes severe penalties on the defiant employee may actually encourage strikes rather than prevent them. By denying government workers the right to strike, this type of legislation may " . . . so weaken the power of the employees that public employers perpetuate extremely inequitable conditions of employment, to the point where the employees strike anyway in desperation."[114]

Second, the particular governmental unit involved may be reluctant to invoke anti-strike legislation for fear that negotiations will be hampered.[115] This was especially true under the recently-repealed Condon-Wadlin Act[116] in New York. The harsh discharge penalties of Condon-Wadlin " . . . became unworkable because of the public employer's unwillingness to enforce them against strong unions. In 1965 and 1966 this practice reached scandalous proportions . . . ."[117]

Third, it would be difficult, if not impossible, to completely re-staff a school system if all of the teachers were discharged for participating in a strike. "From a purely practical viewpoint, teachers en masse cannot be discharged even though their conduct is treated as illegal."[118] As one writer has summarized the problem:

> Although a strike resulting from teacher discontent could be enjoined, an injunction could be violated and the Board might be understandably reluctant to jail violators because of political interests, fear of creating an interminable deadlock, and the problems — more serious with teachers . . . — of replacing jailed workers.[119] (Footnotes omitted.)

The fourth and final reason why anti-strike legislation is largely impotent to halt teacher walkouts is that no law can force people to work when they do not want to.[120] Granted that strikes by teachers are illegal, if they feel that circumstances warrant such drastic action, teachers will simply leave their posts upon the expiration of their contracts, and there is absolutely no way in which

114 *Id.* at 239.

115 Although strikes are specifically banned by statute in Michigan, MICH. STAT. ANN. § 17.455(2) (1960), the Board of Education in Detroit did not take legal action against the teachers. The N.Y. Times reported: "The Detroit system had not sought a court injunction to end the strike. School board officials said the dispute would be settled more easily over the bargaining table." N.Y. Times, Sept. 19, 1967, at 36, col. 8 (city ed.).

116 Law of April 15, 1958, ch. 790, § 108, [1958] McKinney's Session Laws of N.Y. 1007-08 (repealed 1967). A limited discussion of the difficulties under Condon-Wadlin can be found in Seitz, *Public Employee Negotiating and School Board Authority,* LEGAL PROBLEMS OF SCHOOL BOARDS 144-46 (A. Rezny ed. 1966).

117 Gould, *The New York Taylor Law: A Preliminary Assessment,* 18 LAB. L.J. 323, 324 (1967).

118 Seitz, *Public Employee Negotiating and School Board Authority, supra* note 116, at 144.

119 Comment, *Public Employee Collective Bargaining Contracts: The Chicago Teachers,* 33 U. CHI. L. REV. 852, 860 (1966).

120 *See* Millones, *Taylor Law's Baptism,* N.Y. Times, Sept. 27, 1967, at 33, col. 1 (city ed.).

the school board can force them to work. To merely label strike action illegal and state that it can be enjoined by the courts does not solve the problem.

> The mere conclusion that . . . striking on the part of school personnel is not sanctioned, does not fully explain the right of the School Board in combating such tactics. The injunction can be used to halt the activity. School personnel can be discharged and disciplined. Contract rights may be pursued. *There is, however, no way by which individuals can be forced to return to work.*[121] (Emphasis added.)

Therefore, "[i]t must be acknowledged . . . that regardless of public opinion toward strikes, and no matter what legal barriers may be raised by legislatures or courts, public employee strikes will never be entirely eliminated."[122]

E. The New York Teachers' Strike

A brief examination of the strike by the UFT in New York City will serve to illustrate the problems previously discussed. Although the strike began on September 11, 1967, the day on which the city's schools were scheduled to open for the new school year, the teachers' contracts with the city had expired on June 30, 1967.[123] Therefore, negotiations had been in progress for some time prior to the stoppage. Against the background of the strike loomed the new Taylor Law[124] which became effective September 1, 1967, after being hailed by Governor Rockefeller as "milestone legislation."[125] Like its predecessor, the Condon-Wadlin Act, the Taylor Law specifically forbade strikes on the part of governmental employees.[126] Because of this, the UFT attempted to circumvent the law's application through the device of "mass resignations."[127] Resignation forms completed by the teachers were not submitted individually to the Board of Education, but were deposited with the union.[128] Despite the fact that their contracts had expired, the court granted the Board's request for a preliminary injunction declaring:

> Of course, everyone has the right to resign his position and not return to work, and this includes the teachers. No court, certainly in this country, can compel a teacher to work if he or she did not wish to work. I find, however, that in this case the teachers did not execute these resignations for the purpose of not returning to work and leaving the employ of the

121 Seitz, *Rights of School Teachers to Engage in Labor Organizational Activities*, 44 MARQ. L. REV. 36, 43 (1960).
122 Note, *Economic Institutions and Value Survey: Political Activity, Unionization and Conflicts of Interest—Problem Areas of Public Employment*, 40 NOTRE DAME LAWYER 606, 652 (1965).
123 Opinion of the court in Board of Educ. v. Shanker, dated Sept. 13, 1967, granting a preliminary injunction and denying defendant's cross-motion, as found in N.Y.L.J., Sept. 15, 1967.
124 N.Y. PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT, § 1-4 (McKinney Supp. 1967). A detailed analysis of the new law appears in Gould, *supra* note 117.
125 Millones, *supra* note 120.
126 N.Y. PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT, § 210(1) (McKinney Supp. 1967).
127 N.Y. Times, Sept. 9, 1967, at 18, col. 3-5 (city ed.).
128 Opinion of the court in Board of Educ. v. Shanker, dated Sept. 13, 1967, granting a preliminary injunction and denying defendant's cross-motion, as found in N.Y.L.J., Sept. 15, 1967.

> Board of Education. They executed these resignations at the union's urging to compel their employer to accede to their demands and as a concerted stoppage of work. It was done in an attempt to evade the provisions of the Civil Service Law, the common law and the decisional law, all of which, from time immemorial, forbids and makes illegal a strike on the part of public employees.[129]

Similarly, the court again rejected the union's attempt to differentiate between "mass resignations" and a "strike" when, in issuing a permanent injunction, it flatly stated: "Defendants, in contending that a strike is not the same as the so-called resignations, are urging a distinction without a difference; the argument is specious and a sham and is rejected."[130]

The preliminary injunction failed to halt the strike.[131] Even the judge who issued the preliminary injunction seemed uncertain as to its real effectiveness when he remarked: "The law would not terminate the strike . . . . The people will have to terminate the strike — the Board of Education and the teachers."[132] Furthermore, while the city petitioned the court to enforce the penalty clauses of the Taylor Law, it said " . . . that it did not want the union leaders sent to jail because this would hamper efforts to negotiate an end to the dispute."[133] The strike ended with a very favorable settlement package for the teachers.[134]

Thus, although the UFT was fined and its president sentenced to jail for contempt of court,[135] for all practical purposes the union was able to defy the law and successfully force its demands upon the Board of Education. Perhaps the most important underlying implication of the strike is its effect on the viability of the Taylor Law. The success of the UFT will not go unnoticed by the other municipal employee unions in New York. As the *New York Times* worriedly surveyed the scene: "If the law — widely regarded as the best in any state — is swept away in its first collision with a strong union, the strike fever is likely to communicate itself swiftly to government workers at all levels all over the country."[136] While this dire prediction has yet to materialize, the inability of the Taylor Law to halt the UFT strike serves only to reiterate the point discussed previously: no law can compel teachers to work if they refuse to do so.

V. Objections to Strikes by Teachers — Are they Valid?

The law in the field of labor relations for public school teachers should serve as a balancing mechanism to weigh competing public and private interests. That is, the benefit that society derives from uninterrupted public services must be balanced against the loss for teachers. Laws do not exist for the protection

129 *Id.*
130 Board of Educ. v. Shanker (Sup. Ct., N.Y. County, Oct. 4, 1967).
131 N.Y. Times, Sept. 14, 1967, at 1, col. 8 (city ed.).
132 *Id.*, Sept. 17, 1967, § 4, at 1, col. 3.
133 *Id.*, Sept. 18, 1967, at 1, col. 8, and at 50, col. 1 (city ed.).
134 *Id.*, Sept. 28, 1967, at 50, col. 1 (city ed.). Increased minimum and maximum salary rates for teachers holding a bachelor's degree were set at: (a) Old rate: $5,400 to $9,950; (b) Sept. 1, 1967: $6,200 to $10,350; Sept. 1, 1968: $6,600 to $11,000; Sept. 1, 1969: $6,750 to $11,150.
135 Board of Educ. v. Shanker (Sup. Ct., N.Y. County, Oct. 4, 1967). The union was fined $150,000. Mr. Shanker was fined $250 and sentenced to jail for a period of fifteen days.
136 N.Y. Times, Sept. 17, 1967, § 4, at 1, col. 6.

of majority interests alone. Indeed, one of the essential goals of any legal system is to insure that minority rights are respected. Furthermore, an approach to any legal problem must be carried out on a realistic level. Valuable bargaining techniques should not be denied under the obscure rationale of "public policy." It is with these guidelines in mind that the legality of teacher strikes must be examined.

To begin with, strikes by different classes of public employees do not have the same effect on the public interest. It must be admitted that ". . . a strike by . . . teachers imparts far less danger to the community than a refusal of policemen or firemen to report for work."[137] Therefore, the first question that presents itself is whether all governmental employee strikes should be indiscriminately banned, or whether distinctions should be made by class within the general category of "public employee." Certain classes of public employees must always be denied the right to strike. This principle was recognized by the court in *South Bend Community School Corporation v. South Bend Federation of Teachers* where the bench asserted: "It is . . . obvious to all . . . that prohibition against the right to strike must always prevail in certain instances, that is, armed forces, police, fire and other security sections of governmental activity."[138]

Teachers, however, certainly do not appear to fit into this "absolutely-prohibited" category. Unlike police and firemen, teachers do not protect the physical welfare of the community. Yet, on the other hand, their services are definitely more essential than those of public golf course workers or gardeners whose loss to the public through a strike would be minimal. Hence, as a class, teachers fall into an "intermediate category."[139]

It is precisely because they are in a distinct category that teachers should be differentiated from other municipal employees.[140] Not only are the services they render different in nature from those performed by other classes, but their qualifications are also separate and distinct. Therefore, instead of being indiscriminately prohibited along with those of other municipal employees, teachers' strikes should be judged on their own merits by their effect on the public interest. Unfortunately, this does not always occur.

> Rarely, if ever, are no-strike fiats by courts and legislatures preceded by an investigation to determine whether a functional approach to the problem is feasible or desirable. No attempt is made to determine the extent, if any, to which the denial of the strike is based on imagined fears or out-moded doctrine, and the extent to which it is based on reality. There is a need to delimit the services in which blanket restrictions on the strike are necessary before such restrictions are imposed.[141]

Having determined that a distinction must be made between different

137 Note, *Labor Relations in the Public Service,* 75 HARV. L. REV. 391, 398 (1961).
138 No. D-3208 (Super. Ct., St. Joseph County, Ind., filed Oct. 2, 1967).
139 Note, *supra* note 137, at 410.
140 Wollett, *The Public Employee at the Bargaining Table: Promise or Illusion?* 15 LAB. L.J. 8, 15 (1964), writes: ". . . I am persuaded from my experiences in the field of public education that it would be an egregious policy error to enact omnibus legislation predicated on the assumption that all public employments should be treated alike."
141 Note, *The Strike and Its Alternatives in Public Employment,* 1966 WIS. L. Rev. 549, 582.

classes of public employees, the second question that must be answered is whether, from a realistic viewpoint, prohibitions against teacher strikes are necessary. As noted earlier, one of the reasons for denying school teachers the right to strike is that governmental services may not be obstructed or impeded.[142] Since education is a function of the state, it must be acknowledged that a strike by teachers does impede a governmental service. However, strikes by nongovernmental employees also obstruct public services and these strikes cannot be enjoined. As one commentator has pointedly remarked: ". . . there is not much logic in permitting teamsters to close a school by not delivering coal to it but not permitting teachers to close it by refusing to teach."[143] If uninterrupted governmental services are essential to society, it would appear that *any strike* that impeded those services should be enjoinable. The fact that private employee strikes which interrupt governmental services are not enjoinable lends credence to the suspicion that strikes by school teachers are prohibited as a matter of convenience rather than necessity. It is easier and less costly to bargain with employees who do not possess the right to strike than with those who do. And it is certainly more expedient to simply decree that teacher strikes are forbidden than to cope with the problem of a legitimate strike.

The second reason put forth to deny teachers the right to strike is that such action violates the authority of the government.[144] Once again, the given reason offers no real answer to the problem presented. A court that enjoins a teacher strike on the ground that it defies governmental authority is tendering a conclusion, not a reason. Every violation of a legislative prohibition is, in a sense, a violation of governmental authority. To hold that teachers' strikes constitute a violation of governmental authority does not answer the question why they do so. The obvious answer is that the people, speaking through their elected representatives, have made a value judgment to the effect that such strikes are illegal because they adversely affect the body politic. The relevant inquiry then becomes whether or not a majority of the people can rightfully deny a specific form of concerted action to a minority group simply because it is convenient and beneficial for the majority to do so. An important factor to consider is that municipal governments are the major employers of teachers. Realistically, teachers have to work for the government and will usually only strike when they feel that the situation has become extreme.[145] By denying them the right to strike, the majority is taking away their most valuable weapon at a time when they need it the most.

The third claim presented is that suppression of public employee strikes protects the public health and safety.[146] While this may be a realistic argument when applied to certain classes of public employees, such as police and firemen, it becomes untenable when applied to teachers. Teacher strikes do not threaten the community safety in the same manner as a strike by firemen, or the public health in the same manner as a strike by employees of a community hospital.

142 *See* cases cited note 108 *supra.*
143 Lieberman, *supra* note 113, at 238.
144 *See* cases cited note 109 *supra.*
145 Lieberman, *supra* note 113, at 237.
146 *See* cases cited note 110 *supra.*

Since the immediate effect of a teacher walkout would be the closing of schools, the only meaningful "public health and safety" argument is that the children's education would be impaired by loss of classroom time. But schools are usually closed for vacation periods such as Thanksgiving, Christmas, and Easter, not to mention various other holidays. Yet when schools are closed by a teachers' strike, the time lost suddenly becomes irretrievable.[147] Apart from the fact that there is no necessary relation between the amount of time children spend in the classroom and the amount they actually learn,[148] a more compelling reason exists to support the conclusion that strikes by teachers should not be indiscriminately proscribed as jeopardizing public health and safety. One expert in the field of labor relations for teachers not only attacked the "health and safety" argument but also made a thought-provoking plea for a realistic evaluation of teacher strikes when he wrote:

> It is hypocritical to argue that teachers must not be permitted to strike because such strikes would endanger public safety or welfare while simultaneously supporting the right of other groups to strike in situations that constitute a far more serious threat to public safety or welfare. Granted that certain services must never be subject to strikes, only a *preoccupation with labels* instead of *social realities* justifies the conclusion that all public services belong in this category. *The public-private dichotomy is not a logical basis for deciding what groups should be permitted to strike.* Some strikes in the "private" sector constitute an extremely serious and immediate threat to public welfare and safety; some strikes by public employees constitute no such threat whatsoever. Like all strikes, those by teachers inconvenience some people but they do not endanger the public welfare or safety.[149] (Emphasis added.)

It is suggested that this evaluation of the problem of teachers' strikes deserves close examination. The present burgeoning militancy on the part of teacher organizations together with the impotency of anti-strike fiats creates the need for a new approach in the field of labor relations for teachers.

VI. Conclusion — A Limited Right to Strike for Teachers

Neither legislative nor judicial decrees have been successful in halting strikes by public school teachers. When the traditional alternatives[150] to public employee strikes fail, there is no practical method to prevent or terminate a teacher walkout. When a sizable segment of the community continues to ignore a specific legislative mandate, as is the case in teachers' strikes, the law should be reexamined and the reasons behind it should be the subject of careful scrutiny.

As discussed previously in this Note, the reasons given for the denial of teachers' strikes are the same as those given for other classes of public employees.

147 The questionable rationality of this contention was noted in Lieberman, *supra* note 113, at 238.

148 *Id.*

149 *Id.*

150 *See* Note, *supra* note 141, at 560-69, where the author enumerates and discusses the four primary alternatives to public employee strikes: political persuasion and pressure, mediation, binding arbitration, and fact-finding.

There has been a failure in this area to make a realistic, pragmatic analysis of the effects of a teachers' strike. Instead, the legislatures and the courts have become "preoccupied with labels" and, having once decided that public employees as a category should not have the right to strike, have proceeded to arbitrarily ban *all* public employee strikes. This is a fundamental mistake. As Professor Lieberman noted: "The public-private dichotomy is not a logical basis for deciding what groups should be permitted to strike."[151]

The criterion that should be used to determine whether or not a particular group should be allowed to strike is the effect of such a strike upon the community. Strikes by public school teachers do not have the same effect as those by other classes of public employees and therefore should not be treated as equivalent. Because they are an intermediate class between essential and nonessential public employees, teachers should be given a limited right to strike. This does not mean that they should be allowed to violate their contracts and abandon their posts in the middle of a school term. It does mean, however, that when all bargaining procedures have failed, teachers should be permitted to strike legally. While critics could contend that teachers already possess the ability to exert equivalent pressure on school boards through the submission of individual resignations, and hence the right to strike is unnecessary, this argument ignores two basic considerations. First, all the teachers who did resign would be out of a job; and second, even if the school board was forced to rehire them, such resignations could mean the loss of tenure and valuable pension benefits. Both these consequences make individual resignations an unacceptable and impractical alternative for teachers.

The legislature can confer the ability to strike upon school teachers.[152] Just as the right to strike should not be indiscriminately forbidden, so too, the same right should not be indiscriminately granted. Procedural prerequisites would appear desirable. For example, teacher organizations could be required to bargain collectively and submit to mediation and a fact-finding procedure before being allowed to participate in a strike. Whatever procedural rules are established, teachers should have a legal right to strike. Arguments to the effect that this would enable teachers to force a school board into submission with the threat of a prolonged strike are unrealistic. In the first place, strikes are only used by teachers in extreme conditions. Secondly, because of the meager salaries they already receive, teachers would be as anxious to settle the dispute as the school board. Sweeping prohibitions that deny governmental employees the right to strike are unrealistic, unworkable and illogical when applied to public school teachers. By providing teachers with the right to strike, legislatures would be discarding old myths in favor of new realities.

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151 Lieberman, *supra* note 113, at 238.

152 South Bend Community School Corp. v. South Bend Fed'n of Teachers, No. D-3208 (Super. Ct., St. Joseph County, Ind., filed Oct. 2, 1967); City of Manchester v. Manchester Teachers Guild, 100 N.H. 507, 510, 131 A.2d. 59, 62 (1957).